United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 21, 2004

TO : Richard L. Ahearn, Regional Director
Region 19

Cathleen C. Callahan, Officer-in-Charge
Subregion 36

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Pioneer Electrical Contractors, Inc.
Case 36-CA-9339-1 530-6083-1000
530-6083-1050

IBEW, Local 48 725-6750-0100
Case 36-CB-2503-1 725-6750-2567
725-6750-6700
725-8375-0100
725-8375-5000

These cases were submitted for advice as to whether: (1) the Employer violated Section 8(a) (1) and (5) by repudiating, mid-term, its 8(f) labor agreements with the Union when it terminated those agreements prior to the dates stipulated in their termination provisions; and (2) whether the Union violated Section 8(b)(3) by reneging on an agreement that the Employer could terminate those 8(f) agreements at will. We conclude that since the Employer effectively terminated its agreements with the Union according to the terms that the parties orally agreed upon, despite the fact that those terms were contrary to the termination provisions in the written agreements, or alternatively because the parties never had a meeting of the minds on the purported agreements, neither party acted unlawfully.

FACTS

Dan Hogan, the Employer's President, started Pioneer Electrical Contractors, Inc. (the Employer) in 1998 as a non-union operation. On January 3, 2003,[1] Hogan and several of his employees met with Alan Keser and Greg Parson, who are organizers for IBEW Local 48 (the Union), and discussed the possibility of the Employer signing an 8(f) agreement with the Union. Hogan expressed his concern about the Employer's tenuous financial condition and asked Keser whether he had a back door, for instance, if two or three months down the road if going Union don't work, how do I get

[1] All dates hereafter are in 2003 unless otherwise noted.

out of it? Keser responded by saying, just fax a letter and it would be done. During that same meeting, employee John Thomas also asked Keser if Hogan decided in two or three months that he is not making it, could he get out of the Union. Keser responded, absolutely, all he has to do is write a letter. We have better things to do than hound you. Hogan told the organizers that he would think about signing with the Union. Before leaving the meeting, the organizers gave Hogan some information about the Union; none of the information indicated that the Employer could not get out of the Union in two or three months if it encountered financial difficulties.

On January 9, Hogan and his wife, the Employer's Vice-President, met with Keser and Parson. Hogan was presented with three Letters of Assent to sign, which would designate the local NECA chapter as the Employer's bargaining representative and which incorporated by reference the NECA-Union collective bargaining agreements. Hogan's wife recalled that just before Hogan signed the letters he hesitated, wiped his brow, and said that he was nervous. She then reminded Hogan that he did not have anything to worry about since he could get out of the Union by writing a letter if it did not work out. She also recalled that Keser nodded in the affirmative when she made this statement. Hogan then signed the Letters of Assent, which all read in pertinent part:

> This authorization, in compliance with the current approved labor agreement, shall become effective on the 8th day of January, 2003. It shall remain in effect until terminated by the undersigned employer giving written notice to the Oregon-Columbia Chapter of NECA and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary of the applicable approved agreement.

Each Letter of Assent incorporated by reference a Master Labor Agreement (MLA) for commercial/industrial (inside), material handler, and residential work. The Commercial MLA was effective from January 1, 2003, until December 31, 2006; the Material Handlers MLA was effective from January 1, 2003 until December 31, 2003; and the Residential MLA was effective from an unknown date until December 31, 2003. Each of the MLAs included a termination provision that stated:

> Either party or an Employer withdrawing representation from the Chapter or not represented by the Chapter, desiring to change or terminate this Agreement must provide written notification

> at least 120 days prior to the expiration date of the Agreement or any anniversary date occurring thereafter.

In March, the overhead costs of being in the Union became a financial burden for the Employer so on April 1, Hogan requested that the Union assist him obtain additional work. Hogan showed the Union the Employer's financial records and stated that he did not think the Employer could stay in business if it did not get help. He told the Union that the added burden of the contractual benefit packages was a problem.

On April 2, the Employer, due to its lack of work, sent a letter withdrawing from the Union. On April 3, the Union's attorney sent the Employer a letter stating that it could not withdraw from the Union at that time. The letter stated that the Employer could only terminate the MLAs in accordance with their provisions, which do not allow for termination before the MLAs expire. The next day, Hogan called Keser and asked him why he had received a letter saying that the Employer could not withdraw from the Union when Keser had assured him that all he had to do to withdraw was send a letter. Keser replied it was true that he had said sending the letter was the only thing necessary for the Employer to get out of the Union, but he did not have the final say. He referred Hogan to the Union's Business Manager, Gray Zadow. On April 4, Hogan's wife called Keser and said that she felt as if he had deceived them because he had stated that all the Employer needed to do to get out of the Union was to write a letter. She reminded Keser that as the Union's representative, he had told the Employer it could get out of the Union at anytime and that he had lied to them. Keser acknowledged that he had made the statement but told her that Hogan needed to talk with the Union's Business Manager because the matter was out of his hands.

In a letter dated April 16, the Employer reiterated that for financial reasons, it had withdrawn from the Union by sending the April 2 letter according to their agreement. The letter further stated that Hogan had since talked with Keser about the issue of terminating the contracts and that Keser had told Hogan that, in his opinion, sending a letter was the proper way for the Employer to terminate the agreements. On May 7, the Union sent the Employer a letter stating that the Union agreed that the proper way to terminate the agreements was by faxing or sending a letter but the Employer could not repudiate the agreements mid-term. The letter also stated that to do so was a breach of contract and an unfair labor practice.

On July 16, the Union filed the instant 8(a)(5) charge alleging that the Employer repudiated the parties' MLAs mid-term. On July 23, the Employer filed the instant 8(b)(3) charge alleging that the Union repudiated and reneged on its agreement that the Employer could withdraw from the Union at-will.

ACTION

We conclude that the Employer terminated its agreements with the Union according to the terms that the parties orally agreed upon, despite the fact that those terms were contrary to the termination provisions in the parties' written agreements. In this regard, the parties either mistakenly failed to include the agreed-upon termination date or never reached a meeting of the minds at all. Therefore, neither party bargained in bad faith since the 8(f) agreements had been effectively terminated.

First, we note that under current Board law, the Employer's conduct would normally constitute an unlawful mid-term repudiation of the parties' agreements. It is common practice in the construction industry to establish 8(f) relationships by using Letters of Assent. The Board in several cases has discussed the same Letter of Assent at issue in these cases. Without exception, the Board has found that this Letter binds an employer to all current and subsequent collective bargaining agreements unless the employer terminates both the letter and the underlying agreement within the prescribed periods before expiration.[2] Therefore, "it remains incumbent upon the [employer] to comply with the terms of the collective-bargaining agreements . . . already in effect, including provisions regarding termination of those agreements" even after an employer terminates a Letter of Assent.[3]

Here, the Employer failed to comply with the termination provisions in both the Letters of Assent and the MLAs referred to in the Letters of Assent. The Letters of Assent were to remain in effect until the Employer provided written notice to both the Union and NECA of its desire to terminate the Letters at least 150 days prior to the Letters' anniversary date. While the Employer notified the Union 150 days prior to the letters' anniversary date, it did not notify NECA until September 18. Since the notice

[2] Reliable Electric Co., 286 NLRB 834, 836 (1987); City Electric, Inc., 288 NLRB 443, 444 (1988); Bouille Clark Plumbing, 337 NLRB 743, 748 (2002).

[3] Bouille Clark Plumbing, 337 NLRB at 748.

was received less that 150 days before the anniversary date of the Letters of Assent, which was January 8, the notice was not timely as to NECA and, therefore, the Employer technically remained bound to the terms of the Letters of Assent.

Similarly, each of the MLAs required that the Employer give notification of its intent to terminate at least 120 days before its expiration date. The Employer gave the Union notification on April 2, which is more than 120 days prior to the expiration date of each of the MLAs. However, the provision required that the Employer remained bound to the terms of the MLAs until they expire. So, although the Employer provided the Union with timely notice, the notice could not become effective until the MLAs expire. Thus, ordinarily, the Employer's conduct would violate Section 8(a)(5) as a mid-term repudiation.

However, a dispute exists as to whether the oral statements made during negotiations or the written language in the MLAs should govern how the Employer could terminate the MLAs. The Employer alleges that it only agreed to be bound by the terms that the parties discussed during negotiations, i.e., that it could withdraw from the Union at will by sending the Union a letter. The Employer claims it only agreed to the Letters of Assent and underlying MLAs because of that unwritten term regarding when and how to terminate the agreements. The Union, however, alleges that it never agreed to let the Employer terminate the agreements at will, and that the language in the MLAs speaks for itself. The Union notes that it had used the Letter of Assent in the past and that the language had been interpreted as binding any employer that signed the Letter of Assent to the terms of any MLA mentioned in the Letter of Assent, including its termination provision.

In resolving this dispute, it is necessary to first determine whether the oral statements on which the Employer is relying can be considered at all. The law is well established that written contracts are intended to be a complete and accurate integration of the parties' intent.[4] However, one of the exceptions to this rule is when parol evidence is needed to determine whether an agreement was

[4] Apache Powder Co., 223 NLRB 191, 194 (1976), citing 3 Corbin Contracts § 573 (1960), which states that when parties "[expressed] in writing to which they have [all] assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations, will not be admitted for the purpose of varying or contradicting the writing."

reached at all and, if so, what the agreement was.[5] Here, as in Apache Powder, we find it necessary to consider parol evidence, i.e., the oral statements made during negotiations, to establish whether the parties actually reached an agreement and, if so, to determine the meaning of the parties' agreement.

The parol evidence confirms that at most, the parties reached an agreement providing for termination different from the express terms of the written documents. Thus, there were several oral exchanges regarding the conditions under which the Employer could terminate the agreements. More specifically, Hogan and Thomas both asked Keser what the Employer needed to do if in two or three months it became necessary for the Employer to get out of the Union because of financial problems. Each time Keser directly responded by assuring the Employer that to get out of the Union in such circumstances, the Employer only needed to fax the Union a letter. The Union does not dispute that Keser acted as its agent and had full authority to bind it to a contract, but essentially argues that he made a mistake as to Union policy regarding terms of MLAs executed pursuant to NECA. Any such mistake is binding on the Union, and certainly does not constitute evidence of Keser acting beyond the scope of his authority, especially given his six-year experience negotiating contracts on behalf of the Union.

Hogan signed the Letters of Assent based upon Keser's response that he could terminate the agreements in a couple of months by sending a letter. When, before signing the letters, Hogan made clear that he was nervous about signing them, his wife stated that he did not have anything to worry about based upon what Keser had told them, and Keser specifically acknowledged this. Thus, the parol evidence confirms that the parties did not reach an agreement conforming to the written MLA termination provision but, at most, one that allowed the Employer to terminate the agreements at will.

When parties reach an agreement but, because of a mutual mistake, they fail to reduce what was agreed upon to writing, the appropriate remedy is to reform the written agreement to the agreed upon terms.[6] Here, even after the

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[5] Id. at 191 (Board agreed with the ALJ that "the parol-evidence rule does not operate to exclude testimony offered to establish that in fact no agreement was reached in the first place").

Employer sent its April 2 withdrawal letter, Keser continued to acknowledge that he had told them that it only took sending a letter to get out of the Union. Keser's statements clearly indicated that the parties had agreed to this term and that a mutual mistake had occurred by including different termination provisions. Therefore, we conclude that assuming the parties reached agreements, they should be reformed to include the agreed-upon termination provisions that allow the Employer to terminate the agreements at will.

Subsequently, by providing the Union with the April 2 letter, the Employer terminated the parties' 8(f) agreements and their bargaining relationship.[7] Any alleged Union reneging on an agreement involving termination occurred afterwards. As a result, we conclude that neither party here committed violations implicating the duty to bargain in good faith since the Employer had terminated the agreements prior to any alleged misconduct. Therefore, both charges should be dismissed.

Alternatively, the parties arguably did not reach a meeting of the minds. The Board has held that no meeting of the minds exists where there is a unilateral mistake regarding a written contract between parties. In Apache Powder, the Board stated "[i]f the situation herein is viewed as one of unilateral mistake then:

> There is considerable authority to the effect that a mistake of one party known to the other affects the validity of their agreement. This is held to be true where the mistake is obvious on the face of the contract. Accordingly, where there is a mistake that on the face is so palpable as to put a person of reasonable intelligence on his guard, there is not a meeting of the minds and consequently there can be no contract. 17 Am Jut 2d § 146 at 493-494. . . .

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[6] See Norris Industries, 231 NLRB 50, 63 (1977), where the ALJ, citing 66 Am Jur 2d 521, "Reformation of Instruments," Section 1, ff, extensively reviews the equitable remedy of the reformation of written instruments if a mutual mistake exists.

[7] Under Deklewa, 282 NLRB 1375, 1387 (1987), an employer has the right to terminate an 8(f) relationship upon contract expiration and, if an 8(f) relationship is dissolved, there can be no subsequent bargaining violations.

> In many cases under consideration the party not in error did or should have suspected the existence of a mistake, in which case, of course rescission ... should and would be allowed. 13 Williston on Contracts § 1578 at 514 (1970)."[8]

Here, the parol evidence overwhelmingly establishes the parties' intent and agreement on how to terminate the agreements. It is clear from both the January 3 and January 9 meetings that Hogan only signed the Letters of Assent because he understood that he could terminate the Letters and their underlying MLAs at will if he experienced financial difficulty. However, neither the Letters of Assent nor the MLAs reflected the termination procedure that Hogan and Keser agreed to, thus creating a conflict between the written documents and what the parties intended and agreed to. Keser knew or should have known about the difference between the oral agreement and the written termination provisions given that the Union claimed to have used these documents for years, and Keser himself had been negotiating collective-bargaining agreements for six years.

It was not until after Hogan attempted to terminate the agreements that this mistake became known to him. In its April 3 letter, the Union informed Hogan that the termination provisions in the agreements did not reflect the parties' intent, and stated that the Employer could not presently terminate the agreements. Significantly, the exchange of letters and the discussions after the Union's April 3 letter indicate that the parties had never reached a meeting of the minds as to the termination provisions in the agreements. Thus, we conclude that arguably this mistake was so palpable that a reasonably intelligent person, in this case Keser, should have suspected the mistake, in which case rescission of the contracts should be allowed because there was no meeting of the minds. Under this analysis, the parties never effectively agreed to any contracts and, therefore again, no violations occurred.

Accordingly, we conclude that, absent withdrawal, the charges in both cases should be dismissed. The Employer lawfully terminated its agreements with the Union according to the terms that the parties agreed upon, despite the fact that those oral terms were contrary to the termination provisions in their written agreements, or no agreements ever bound the parties. Similarly, the Union conduct at issue occurred in the absence of a bargaining relationship and, absent any attempt to enforce the agreements other than filing an 8(a)(5) charge to resolve the disputed existence

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[8] 223 NLRB at 195.

of a bargaining relationship, the Union did not violate Section 8(b)(3).

B.J.K.